Rucraft Foundry *and* International Molders & Allied Workers Union, Local 164, AFL-CIO-CLC. Case 32-CA-4077

May 289, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on November 17, 1981,[1] by International Molders & Allied Workers Union, Local 164, AFL-CIO-CLC, herein called the Union, and duly served on Rucraft Foundry, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on November 23, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on November 2, 1981, following a Board election in Case 32-RC-1353,[2] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about November 6, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On or about December 10, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 25, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 4, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted.[3] Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause Respondent denies the validity of the Union's certification and its status as bargaining representative of the unit employees. In addition, Respondent asserts as affirmative defenses (1) that an uncoerced majority of the unit employees did not designate the Union as their bargaining representative and (2) that the Union resorted to "coercive and inflammatory appeals to racial, ethnic, and national origin prejudice" during the election campaign, as shown by evidence elicited during a hearing on objections in Case 32-RC-1351 involving Respondent's parent corporation, Basic Tool and Supply Co., Inc., and the same Union. Respondent contends that the newly discovered evidence presented in its second affirmative defense raises substantial and material issues concerning the Union's alleged objectionable conduct in the underlying representation proceeding. The General Counsel argues that Respondent is estopped from raising its second affirmative defense because it had included this matter in its objections to the election and subsequently withdrew the objection concerning it. The General Counsel further contends that Respondent's first affirmative defense was raised during the underlying representation proceeding of this case and thus may not be relitigated in the subsequent and related unfair labor practice proceeding. We agree with the General Counsel.

Our review of the record herein, including the record in Case 32-RC-1353, indicates that on April 10, 1981, the Union filed a petition in which it sought to represent certain of Respondent's employees. On May 6, 1981, the Regional Director approved a Stipulation for Certification Upon Consent Election signed by the parties which provided for an election in the following bargaining unit:

> All production and maintenance employees and plant clericals employed by Respondent at its 707 Jones Street, Berkeley, California, location; excluding all office clerical employees, guards, and supervisors as defined in the Act.

Thereafter, an election was held on June 12, 1981. The tally of ballots showed eight votes cast for the Union and one against. There were two

[1] An amended charge was filed on November 18, 1981.

[2] Official notice is taken of the record in the representation proceeding, Case 32-RC-1353, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[3] On February 8, 1982, the Union filed a "Joinder in Motion for Summary Judgment and for Award of Attorneys' Fees."

challenged ballots, an insufficient number to affect the results of the election. Respondent filed timely objections to the conduct of the election, alleging, *inter alia*, that the Union intimidated and coerced employees by making various false accusations and by engaging in false appeals to racial prejudice in its preelection conduct. In a letter dated July 13, 1981, Respondent withdrew the objection concerning appeals to racial bias on the ground that "it could not get affected employees to step forward" with evidence of the alleged misconduct. Respondent's remaining objections were overruled in their entirety by the Regional Director in his Report and Recommendations on Objections issued on August 7, 1981. Thereafter, Respondent filed with the Board its exceptions to the Regional Director's report essentially reiterating the contentions set forth in its objections. Respondent further argued that its objection concerning appeals to racial prejudice was withdrawn only because the atmosphere of fear created by the Union precluded Respondent's investigation. On November 2, 1981, the Board issued its Decision and Certification of Representative (unpublished) in which it adopted the Regional Director's findings and recommendations and certified the Union as the bargaining representative of the employees in the appropriate unit.

On or about November 6, 1981, the Union, by telegram, requested Respondent to recognize it as the exclusive bargaining representative of Respondent's employees in the appropriate unit and to bargain with it collectively. By letter dated November 17, 1981, Respondent stated that it refused to recognize and bargain with the Union as the exclusive bargaining representative of the unit employees because it decided to test by judicial review the Union's certification.

As noted, Respondent admits its refusal to bargain and affirmatively asserts, *inter alia*, that the Regional Director and the Board erroneously failed to consider the "new evidence" of appeals to racial prejudice presented in its answer to the complaint. Although Respondent previously withdrew the objection concerning appeals to racial prejudice, it now seeks to revive that objection on the basis of evidence of similar misconduct by the same union organizers during the same time period at Respondent's parent company, Basic Tool and Supply Co., Inc. This evidence was elicited at the hearing in Case 32-RC-1351. We find no merit in Respondent's argument. The employees at Basic Tool and Supply Co., Inc., the Employer in Case 32-RC-1351, are not the employees in this case and the facts surrounding the election in Case 32-RC-1351 have no bearing on the election in this case. The objection which Respondent withdrew as unsupportable cannot now be resurrected on the basis of "newly discovered" alleged union misconduct at an entirely different operation.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[5]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a California corporation, has an office and place of business in Berkeley, California, where it is engaged in the manufacture and wholesale sale of castings. During the 12-month period preceding the issuance of the complaint, in the course of its business, Respondent sold goods and services valued in excess of $50,000 to customers or business enterprises within the State of California which themselves meet one of the Board's jurisdictional standards other than the indirect inflow or indirect outflow standards.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Molders & Allied Workers Union, Local 164, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

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[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[5] The Union's request for attorney's fees is hereby denied as we do not find Respondent's defenses to be "patently frivolous." *Heck's Inc.*, 215 NLRB 765 (1974).

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees and plant clericals employed by Respondent at its 707 Jones Street, Berkeley, California, location; excluding all office clerical employees, guards, and supervisors as defined in the Act.

2. The certification

On June 12, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 32, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on November 2, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about November 6, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 6, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since November 6, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Rucraft Foundry is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Molders & Allied Workers Union, Local 164, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees and plant clericals employed by Respondent at its 707 Jones Street, Berkeley, California, location excluding all office clericals employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 2, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 6, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employ-

ees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Rucraft Foundry, Berkeley, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Molders & Allied Workers Union, Local 164, AFL-CIO-CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees and plant clericals employed by Respondent at its 707 Jones Street, Berkeley, California, location; excluding all office clerical employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Berkeley, California, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Molders & Allied Workers Union, Local 164, AFL-CIO-CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees and plant clericals employed by the Employer at its 707 Jones Street, Berkeley, California, location; excluding all office clerical employees, guards, and supervisors as defined in the Act.

RUCRAFT FOUNDRY